

<b>SEHLUKENE SIBANDA</b>	<b>APPLICANT</b>
<b>AND</b>	
<b>SIFISO SOMFULA THEBE</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	
<b>ALPHA CONSTRUCTION PROPERTY DEVELOPERS</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>AND</b>	
<b>REGISTRAR OF DEEDS</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>AND</b>	
<b>CITY OF BULAWAYO</b>	<b>4<sup>TH</sup> RESPONDENT</b>

IN THE HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 6 JUNE 2011 AND 23 JUNE 2011

*Mrs N. Tachiona* for applicant  
1<sup>st</sup> Respondent in person  
2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents in default

Opposed Application

**MATHONSI J:** The second respondent is a land developer who was allocated vacant stands in the high density suburb of Cowdray Park by the fourth respondent for purposes of constructing houses for home seekers in Bulawayo. The terms of the agreement between the second and fourth respondents are not the subject of this application.

The second respondent entered into an agreement with the first respondent sometime in 1999 in terms of which the second respondent allocated stand 6711 Cowdray Park, Bulawayo to the first respondent and agreed to construct a two roomed house on the stand subject to certain terms and conditions. The relevant terms of that agreement as set out in fourth respondent's pleadings in case number HC 2367/05 were that the first respondent would pay a deposit towards the purchase of the stand. He would pay the balance of the purchase price and the costs of construction of the house in due course.

In return, the second respondent would construct the house for the first respondent. In order to facilitate the funding of the construction project, the second respondent arranged to transfer the stand to the first respondent to pave the way for the registration of a mortgage bond in favour of Founders Building Society, the financier which had agreed to fund the construction work.

This was done by deed of transfer number 4570/99 in favour of the first respondent and mortgage bond number 5210/99 for \$60725.00 in Zimbabwean currency. The second respondent has alleged that the first respondent failed to honour his part of the bargain and did not pay anything towards the purchase price of the stand and the cost of construction. He did not even take up the loan facility which had been made available to him by Founders Building Society resulting in the mortgage bond being cancelled on 5 October 2006.

The second respondent withdrew the stand from first respondent and offered it to the applicant who immediately paid for it and secured funding from Beverley Building Society in the sum of \$184000-00 for the cost of construction. To facilitate registration of the mortgage bond, the stand was transferred to the applicant by deed of transfer number 1272/2002 on which mortgage bond number 6969/2004 was registered in favour of Beverley Building Society. At that time first respondent had disappeared.

It would appear that there was an error at the Deeds Registry in that deed of transfer number 1272/2002 was registered without cancellation of deed of transfer number 4570/99 in first respondent's favour. Be that as it may, the applicant obtained funds from the bank which were used to construct a three roomed house by the second respondent as opposed to the two roomed house which the first respondent had negotiated.

Attempts to cancel the first transfer to the first respondent did not succeed. Instead third respondent purported to cancel the second transfer in favour of the applicant by letter dated 13 December 2004 addressed to second respondent, which reads in part as follows:

**"RE: STAND 6711 COWDRAY PARK TOWNSHIP OF COWDRAY PARK OF THE HELENVALE BLOCK.**

This serves to confirm that the above stand was first titled on 15 September 1999 under deed of transfer number 4570/1999. On 23<sup>rd</sup> May 2002 in error Deed of Transfer

number 1272/2002 was registered in the name of Sehlukene Sibanda. This deed should be cancelled as its registration was done in error. Such an error is sincerely regretted. The true registered owner of the above stand therefore Sifiso Somfula Thebe.

Yours sincerely  
(Signed)  
F. Maphosa (Mrs)  
REGISTRAR OF DEEDS, BULAWAYO.”

Section 8(1) of the Deeds Registries Act, [Chapter 20:05] provides:

“Save as is otherwise provided in this Act or in any other enactment, no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made, as security, shall be cancelled by a registrar except upon an order of court.”

In my view, while there was an error in the registration of the deed of transfer in favour of the applicant, regard being had to the fact that the same property had already been registered in the name of the first respondent, the third respondent however did not have authority to cancel that deed which could only be cancelled upon an order of court.

The purported cancellation is therefore a nullity. The situation obtaining at the moment therefore is that there are two deeds in respect of the same property with the second one in favour of the applicant having been registered in error.

The first respondent appeared in person and submitted deed of transfer No. 4570/99 as proof of ownership. He stated that he was given the deed by second respondent after he had paid for the stand and the construction in full, otherwise second respondent would not have given him the deed. His attention was drawn to the fact that the mortgage bond registered on his deed had been cancelled on 5 October 2001 long before construction of the house had commenced. He could not explain how this happened.

The first respondent confirmed that when he visited the site in 2002 there was a structure being constructed. Asked to produce proof that he had paid for the stand and the construction he produced four receipts. The first receipt was issued by second respondent on 1 April 1997 in the sum of \$400-00 local currency and shows that the payment was “accommodation deposit”. The second is a receipt issued by *Webb Low and Barry legal*

*practitioners* on 27 April 1999 in the sum of \$1863-10 local currency, for “Bond FBS” presumably for the registration of a bond in favour of Founders Building Society.

The third receipt is for \$17250-00, local currency, issued by *Coghlan and Welsh* legal practitioners on 5 November 2003 as consultation fee. The last one is a Barclays Bank cash deposit slip of \$150000-00 local currency into the account of TLP AGENCIES (PVT) LTD. The depositor’s address is given as 6711 Cowdray Park Bulawayo. This is a payment which was made long after the house had been constructed using funds availed by Beverley Building Society through a loan facility extended to the applicant who serviced the loan in full.

The first respondent therefore has not shown that he paid the purchase price of the stand and the costs of construction of the house.

At the hearing I allowed the parties to submit further documents if they so wished which would help clarify the issues in dispute. The documents submitted by first respondent show that he had been offered a loan by Founders Building Society to develop the stand but he never took that loan.

An affidavit by one Edmond Moyo was also put in and it reads as follows:

“I am employed by Alpha Construction as an administration director. When we went into an agreement with Sifiso Thebe, we arranged with our financiers Founders Building Society to give him a mortgage bond for House No. 6711 Cowdray Park. He never withdrew the mortgage money, so no payment was done to us.

We later sold the property to Sehluken Sibanda after failing to trace Thebe who was reported to be working in Botswana. It took more than 4 years before we saw Thebe who only appeared demanding the house which had already been constructed for Sehluken Sibanda and was staying there, using funds from Beverley mortgage bond for Sehluken Sibanda. The property was paid for by Beverley Building Society not Thebe’s Founders Building Society.

We were only made aware of this case when Thebe approached us seeking assistance. We are not able to assist Mr Thebe since he never paid for the property. Accordingly the property, according to our records belongs to Sehluken Sibanda.

When we discovered that the property had been double registered we approached the Deeds Office who apologised and advised us that the error was regrettable. Founders Building Society have and had no interest in the said property since they never parted with any money for the property.”

This explanation puts the matter in proper perspective and shows why the first respondent was unable to produce proof that he paid for the property. What we have here is a situation where the first respondent took advantage of the title deed in his name which had not been cancelled. When applicant bought the property it had been repossessed from the first Respondent but he unlawfully evicted the applicant who had paid for the construction of the house on the stand.

This is clearly a case of a double sale in which the same property was sold to both first respondent and the applicant. I had occasion to examine the law relating to double sales of immovable property in *Howera v Mudzingwa and Others* HB 123/10 at pages 8-9 of the cyclostyled report where I made reference to *Crundall Brothers (Pvt) Ltd v Lazarus N.O and another* 1991 (2) ZLR 125 (S) at 132G and 133A-B where the Supreme Court stated:

“This approach was set out as follows by Professor McKerron in (1935) 4 SA Law Times 178 and repeated with approval by Professor Burchell in (1974) 91 SALJ 40:

“It is submitted that where A sells a piece of land first to B and then to C – and the position is the same mutatis mutandis in the case of a sale of a movable of which the court would decree specific performance – the rights of the parties are as follows:-

- (1) ---
- (2) where transfer has been passed to C, C acquires an indefeasible right if he had no knowledge, either at the time of sale or at the time he took transfer, of the prior sale to B, and B’s only remedy is an action for damages against A. If, however, C had knowledge at either of these dates, B, in the absence of special circumstances affecting the balance of equities, can recover the land from him, and in that event C’s only remedy is an action for damages against A.”

In that case the court accepted that when the second purchaser is entirely ignorant of the claims of the first purchaser, and takes transfer in good faith and for value, his real right cannot be disturbed (p131F). It also accepted that there may be special circumstances affecting the balance of equities, which should guide the court even where the second purchaser was aware of the first purchaser’s prior right.

In casu, at the time the applicant entered into a sale agreement with the second respondent he was advised that the vacant stand in question had been repossessed from the first respondent for failure to pay. He was given a copy of a letter addressed to the

conveyancers, *James Moyo Majwabu and Nyoni* by the seller to that effect. He therefore was entirely unaware that the first respondent would raise a claim. For that reason, the applicant's claim deserves to be respected.

Even if I am wrong in that conclusion, this is a case where there are special circumstances which affect the balance of equities. The applicant purchased the property for value at a time when it was a vacant stand. He paid for the construction of a three roomed house as opposed to the first respondent's two roomed one. The first respondent did not pay for the construction and only surfaced after completion of the house.

The first respondent unlawfully evicted the applicant from the house when the latter had title to it. This is a peculiar case where both of them hold title even though that of the applicant ought not to have been registered. The balance of equities however favour the applicant.

I am therefore persuaded that the applicant has made out a good case for the relief sought.

In the result it is ordered that:

- (1) The deed of transfer number 4570/99 for stand 6711 Cowdray Park Township of Cowdray Park of the Helenvale Block, Bulawayo, in favour of the first respondent is hereby cancelled.
- (2) The deed of transfer number 1272/2002 for stand 6711 Cowdray Park Township of Cowdray Park of the Helenvale Block, Bulawayo in favour of the Applicant is hereby upheld.
- (3) The first respondent and all those claiming occupation of the said stand through him are directed to forthwith vacate the property failing which the Deputy Sheriff should eject them.
- (4) The costs of this application shall be borne by the first respondent.

*Bulawayo Legal Projects Centre*, applicant's legal practitioners